

No. 11723

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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A. J. GOERIG and CLYDE PHILP,

Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a corporation, and J. W. MORRISON, an individual, doing business as J. W. Morrison company,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

NOV 28 1947

PAUL P. GORDON



No. 11723

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A. J. GOERIG and CLYDE PHILP,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

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Yakima, Washington,

Attorneys for the use Plaintiff  
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BROWN & HAWKINS,

Miller Building,  
Yakima, Washington,

Attorneys for A. J. Goerig  
and Clyde Philp,  
Defendants and Appellants.

SKEEL, McKELVY, HENKE, EVENSON &  
UHLMANN,

Insurance Building,  
Seattle 4, Washington,

Attorneys for Continental Casualty Co.,  
Defendant and Appellee.

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Court No. 251

THE UNITED STATES OF AMERICA FOR  
THE USE OF J. W. MORRISON, an indi-  
vidual d/b/a J. W. Morrison Company,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, DON MACRI,  
CLYDE PHILP, A. J. GOERIG, SAM  
BURNSED and JOHN DOE McCARTY, co-  
partners and joint adventurers d/b/a Macri &  
Company, and CONTINENTAL CASUALTY  
COMPANY, an Indiana Corporation,

Defendants.

## COMPLAINT

Comes Now the Plaintiff and for Cause of Action  
against the Defendants above named and each of  
them alleges:

### 1.

That at all times herein mentioned the Plaintiff  
J. W. Morrison was and now is an individual doing  
business as J. W. Morrison Company and that he  
has duly filed his business certificate as by law  
required.



## 2.

That this action is brought in the name of the United States of America as Plaintiff for the use of J. W. Morrison, an individual doing business as J. W. Morrison Company under and by virtue of the authority granted by an Act of Congress approved August 24, 1935 (c. 642, sections 1 and 2; 49 Statutes at Large 793, 794). Said Plaintiff at all times herein set forth has been and now is a citizen of the State of Washington.

## 3.

That at all times herein mentioned the Defendants Sam Macri, Joe Macri, Don Macri, Clyde Philp, A. J. Goerig, Sam Burnsed and John Doe McCarty (whose true Christian name is unknown to Plaintiff) were and now are co-partners or joint adventurers doing business as Macri & Company. That said Defendants will hereafter be referred to as Macri & Company. That at all times said Defendants were and now are citizens of the State of Washington.

## 4.

That at all times herein mentioned the defendant Continental Casualty Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Indiana, carrying on a general surety business and authorized as such to carry on such surety business in the State of Washington. That said Defendant Continental Casualty Company is a citizen of the State of Indiana.

## 5.

That on or about May 18, 1944, the United States of America through the Department of Interior and Macri & Company made and entered into a certain contract, being Contract No. 12r-14996, for Earthwork, Pipelines and Structures, Laterals 70.1 to 84.6 and Sublaterals, East Turbine Lateral, Station 260+00 to the end, and Sublaterals East Turbine Lateral Wasteway, and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington, Specifications No. 1068, wherein and whereby said Defendant contractors Macri & Company contracted to furnish materials and perform work in accordance with said contract for the sum of \$169,667.50.

## 6.

That on or about May 18, 1944, to secure faithful performance of said contract and prompt payment to all persons supplying labor and materials employed or used in the prosecution and completion of the work provided for in said contract, said Defendants Macri & Company as principals and Continental Casualty Company, an Indiana corporation, as surety, made, executed, and delivered to the United States of America as obligee a bond or undertaking as required by law in the sum of \$84,833.75; that said bond was conditioned that if the said Defendants Macri & Company should promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract above described, the

said bond should be void, but otherwise to remain in full force and effect. That upon the award of said contract to the Defendants Macri & Company, said bond became binding and ever since has remained in full force and effect.

## 7.

That the aforesaid contract No. 12: 14996 was and now is a contract for the prosecution and completion of a public work of the United States within the meaning of the Act of Congress referred to above, which said contract was performed and executed in Yakima County in the Eastern District of the State of Washington.

## 8.

That heretofore and on or about the 21st day of April, 1944, the Defendants Macri & Company entered into a subcontract in writing with J. W. Morrison, as individual d/b/a J. W. Morrison Company, wherein and whereby said Defendants Macri & Company subcontracted to said J. W. Morrison Company the following work at the agreed upon contract price, to-wit:

Item 1—Excavation common for laterals at .29c per cu. yd.

Item 2—Excavation rock for laterals at \$1.00 per cu. yd.

Item 3—Overhaul at .03c per cu. yd.

Item 4—Compacting embankments at .30c per cu. yd.

Item 14—Dry rock paving at \$2.35 per sq. yd.

9.

That said Defendants Macri & Company have in their possession a copy of said written contract above referred to.

10.

That pursuant to said subcontract hereinabove referred to, said subcontractor J. W. Morrison, an individual doing business as J. W. Morrison Company, between on or about May 18, 1944, and October 15, 1945, furnished labor and materials and performed services for said Defendants Macri & Company at their special instance and request of the reasonable and agreed value of \$36,730.85, an itemized list of said work, labor, materials and services furnished and performed by said Plaintiff J. W. Morrison Company being hereto attached marked Exhibit "A" and by reference thereto made a part hereof.

11.

That said J. W. Morrison Company has made repeated demands upon said Macri & Company for payment of said sum of \$36,730.85 but said Defendants Macri & Company and each of them have failed, neglected and refused to pay said amount except the sum of \$29,074.65, an itemized list of said payments being hereto attached marked Exhibit "B" and by reference thereto made a part hereof.

12.

That heretofore and on or about the 7th day of January, 1946, said Defendants Macri & Company

and said Plaintiff J. W. Morrison Company orally agreed that the balance owing from said Defendants to said Plaintiff was the sum of \$7,656.20 and said Plaintiff further agreed that if payment of the said balance owing to him by said Macri & Company was made immediately in cash, said Plaintiff would accept in full settlement of his said account the sum of \$6,869.62; that thereupon said Macri & Company made and delivered to said Plaintiff its check in the amount of \$6,869.62 which was duly endorsed by said J. W. Morrison Company and presented for payment and said check was thereafter returned by the bank upon which it was drawn marked "NSF." That there is now due and owing and unpaid from the said Defendants Macri & Company to the Plaintiff J. W. Morrison Company the sum of \$7,656.20, together with interest thereon at the rate of six per cent per annum from October 15, 1945, until paid.

### 13.

That more than ninety days have elapsed since the last work, labor and materials were furnished by said J. W. Morrison Company as hereinabove set forth and less than one year has elapsed since the complete performance and final settlement of said Contract No. 12r 14996 was made. The final settlement under said contract was made on October 15, 1945.

### 14.

That the ground upon which the jurisdiction of this court is invoked is that the action arises under

the Act of Congress referred to above which expressly directs the bringing of said action in this court, to-wit: The United States District Court, Eastern District of Washington, Southern Division, being the district in which said contract was to be and was performed and completed.

Wherefore, the Plaintiff demands judgment in favor of the United States for the use and benefit of J. W. Morrison d/b/a J. W. Morrison Company against Defendants and each of them in the sum of \$7656.20, together with interest thereon at the legal rate of six per cent per annum from the 15th day of October, 1945, until paid, and for said Plaintiff's costs and disbursements herein expended and incurred and for such other and further relief as to the court may seem meet and proper in the premises.

C. W. HALVERSON,  
J. S. APPLGATE,

Attorneys for Plaintiff.

State of Washington,  
County of Yakima—ss.

J. W. Morrison, being first duly sworn, on oath deposes and says: That he is the above named individual doing business as J. W. Morrison Company and Plaintiff in the above entitled action; that he has read the foregoing Complaint, knows the contents thereof and the same are true as he verily believes.

J. W. MORRISON.



Subscribed and sworn to before me this 12th day of February, 1946.

C. W. HALVERSON,  
Notary Public in and for the State of Washington,  
residing at Yakima.

### EXHIBIT A

For work performed on Specification 1068, Roza Project according to sub-contract as follows (Revised) :

Item 1—Excavation, Common for Laterals	
109,448.3 cubic yards at \$0.29.....	\$31,740.01
Item 2—Excavation, S. R. for Laterals	
141.7 cubic yards at \$1.00 .....	141.70
Item 3—Overhaul 11,255 Sta. cu. yds. at \$0.03	337.65
Item 4—Compacting Embankments	
3,482 cubic yards at \$0.30 .....	1,044.60
Item 14—Dry Rock paving	
992.8 sq. yds. at \$2.35.....	2,333.08
Total Sub-Contract.....	\$35,597.04
Force Account Bill No. 1 (allowed for extras)	905.51
Plus Bill Submitted for Structure Excavation performed for Maeri & Company on Dry Rock Paving.....	228.30
Total Work Performed.....	\$36,730.85

### EXHIBIT B

Payments received on monthly estimates (revised) :

8/22/44—July Estimate—No. 1.....	\$ 947.27
10/ 6/44—August “ “ 2.....	4,116.69
11/ 7/44—September “ “ 3.....	5,585.65
11/22/44—October “ “ 4.....	688.29
12/27/44—November “ “ 5.....	2,620.91
1/ 2/45—December “ “ 6.....	1,667.54

2/26/45—Jan.	Estimate No. 7.....	\$ 200.28
3/19/45—February	“ “ 8.....	2,488.68
5/ 3/45—March	“ “ 9.....	8,781.66
8/ 2/45—April	“ “ 10.....	435.00
—May	“ “ 11.....	0.00
8/ 2/45—June	“ “ 12.....	350.94
8/ 2/45—Force Account Bill No. 1....		805.91
		<hr/>
		\$28,709.62
Allowance of 1% for Bond.....		365.03
		<hr/>
Total payments received.....		<u><u>\$29,074.65</u></u>

[Endorsed]: Filed Feb. 13, 1946.

[Title of District Court and Cause.]

### ANSWER

Come now the defendants Clyde Philp and A. J. Goerig and for answer to plaintiff's complaint admit, deny and allege as follows:

#### 1.

For answer to paragraph 1 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 1.

#### 2.

For answer to paragraph 2 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 2.



## 3.

For answer to paragraph 3 of plaintiff's complaint these answering defendants deny each and every allegation therein contained and particularly deny that these answering defendants were associated with Sam Macri, Joe Macri, Don Macri, Sam Burnsed or John Doe McCarty as co-partners or joint adventurers. These answering defendants allege that any relationship existing between these answering defendants and the other above named defendants was terminated prior to the incurring of the liability, if any, alleged or averred in plaintiff's complaint.

## 4.

For answer to paragraph 4 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 5.

For answer to paragraph 5 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 6.

For answer to paragraph 6 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

## 7.

For answer to paragraph 7 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

8.

For answer to paragraph 8 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

9.

For answer to paragraph 9 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

10.

For answer to paragraph 10 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

11.

For answer to paragraph 11 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

12.

For answer to paragraph 12 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

13.

For answer to paragraph 13 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

14.

For answer to paragraph 14 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully answered plaintiff's complaint pray that the same be dismissed with prejudice and that these answering defendants be granted judgment against the plaintiff and against J. W. Morrison, an individual d/b/a J. W. Morrison Company, for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants

A. J. Goerig and

Clyde Philp.

Service accepted and copy received of the foregoing Answer this 27th day of March, 1946.

C. W. HALVERSON,

J. S. APPLGATE,

Attorneys for Plaintiff.

Filed May 17, 1946.

[Title of District Court and Cause.]

## ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Continental Casualty Company, a corporation, and in answer to plaintiff's complaint admits, denies and alleges as follows, to-wit:

### First Defense

#### I.

This answering defendant admits Paragraphs 1, 2, 3, 4, 5, 6, 7, 13 and 14 of plaintiff's complaint.

#### II.

This answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraphs 8, 9, 10, 11, and 12 and therefore denies said paragraphs and each and every part thereof and specifically denies that this answering defendant is indebted to the plaintiff in the sum of \$7,656.20 or any other sum whatsoever or at all.

### Cross-Complaint

Comes now this answering defendant and for cross-complaint against Sam Macri, Joe Macri, Don Macri, Clyde Philp, A. J. Goerig, Sam Burnsed and John Doe McCarty, co-partners and joint adventurers d/b/a Macri & Company and alleges as follows, to-wit:

#### I.

This cross-complaining defendant, Continental

Casualty Company, realleges and makes a part hereof as though fully set forth at length Paragraphs 1, 2, 3, 4, 5, 6, and 7 of Plaintiff's complaint.

## II.

That in connection with the issuance of defendant Continental Casualty Company's payment bond above mentioned and as part of the consideration for the issuance thereof, the defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to-wit:

“Second. To indemnify the company against all loss, costs, damages, expenses and attorney's fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

## III.

That in the event use plaintiff in this case recovers judgment against Continental Casualty Company, then under the terms of said bond application and said bond, the said defendant, Continental Cas-

ualty Company, is entitled to and hereby demands judgment in an equal amount, plus costs and attorney's fees, against each of the above named co-defendants and joint adventurers and each of them jointly and severally.

Wherefore, having fully answered use plaintiff's complaint, this defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of use plaintiff against Continental Casualty Company, that it have and recover judgment in an equal amount, plus its costs and disbursements of this suit and a reasonable attorney's fee to be fixed by said Court, against each of the above named individuals defendants doing business as Macri & Company, co-partners and joint adventurers, and each of them jointly and severally.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN.

By WILLARD E. SKEEL.

United States of America,  
State of Washington,  
County of King—ss.

Warner M. Bruce, being first duly sworn, on oath deposes and says: That he is superintendent of Continental Casualty Company, a corporation, the defendant in the above entitled action; that he makes this verification for and on behalf of said corporation; that he is authorized so to do; that he has

read the foregoing instrument, knows the contents thereof and believes the same to be true.

WARNER M. BRUCE.

Subscribed and sworn to before me this 28th day of February, 1946.

[Seal] K. VAN IORNS,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Received March 4, 1946.

GRANVILLE EGAN,  
Atty. for MGB.  
BRETHORST, HOLMAN,  
FOWLER & DEWAR,  
Attys. for Defts. Macri.

Filed March 6, 1946.

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[Title of District Court and Cause.]

REPLY AND ANSWER TO ANSWER AND  
CROSS-COMPLAINT OF CONTINENTAL  
CASUALTY COMPANY

Come now A. J. Goerig and Clyde Philip, two of the above named defendants, and for reply and answer to the answer and cross-complaint of Continental Casualty Company, a corporation, admit, deny and allege as follows:

1.

For reply to paragraphs 1 and 2 of the defendant's first defense these answering defendants deny each and every allegation admitted by said defendant therein.



## 2.

For answer to paragraph 1 of said defendant's cross-complaint these answering defendants deny each and every allegation therein contained or therein replied to.

## 3.

For answer to paragraph 2 of said cross-complaint these answering defendants deny the same and each and every allegation therein contained, and particularly deny that the defendant Macri & Company executed and signed any application directed to the Continental Casualty Company for and on behalf of these answering defendants.

## 4.

For answer to paragraph 3 of said defendant's cross-complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully replied and answered to defendant Continental Casualty Company's answer and cross-complaint pray that these answering defendants have and recover judgment against said defendant Continental Casualty Company for their costs and disbursements taxable by law.

NAT. U. BROWN,  
KENNETH C. HAWKINS,  
Attorneys for defendants  
A. J. Goerig and  
Clyde Philp.

Filed Aug. 26, 1947.



[Title of District Court and Cause.]

ORDER ON PRE-TRIAL

Pursuant to an order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

C. W. Halverson appearing at attorney for plaintiff;

Thomas Holman and A. T. Bateman appearing as attorneys for defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Willard E. Skeel appearing as attorney for Continental Casualty Company.

It is stipulated that any party to this cause may offer in evidence any of the documents marked for identification in cause No. 267 without objection as to signatures and authenticity of such document.

It is further stipulated that the use plaintiff is entitled to judgment in the amount of \$7,262.91 with interest from the date of judgment, subject to the judgment being appropriately fixed as to judgment debtors, all under Specification #1068.

It is further stipulated that there are no written agreements between the defendants Macri and defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1" pertaining to Specifications #1062 and #1068.

It is further stipulated that the Continental Cas-

ualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees.

It is further stipulated that at the time of entering the principal contracts, the defendants Sam Macri, Joe Macri and Don Macri were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of the City of Seattle in the Western District of Washington.

It is further stipulated that this cause be consolidated with causes numbered 250, 255, 257 and 267 for the trial of the remaining issues and be tried on February 19, 1947, at 10:00 a.m.

It Is Ordered and Adjudged that the above stipulation be and the same are hereby approved and made a part of the record in the above entitled cause.

Dated this 27th day of January, 1947.

SAM M. DRIVER,

United States District Judge.

Filed Jan. 27, 1947.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case came on duly and regularly for pre-trial hearing on the 8th day of January, 1947, and for trial on the 19th day of Feb-

ruary, 1947, before the Hon. Sam M. Driver, Judge of the above entitled court, the Use-Plaintiff, J. W. Morrison, an individual d/b/a J. W. Morrison Company, appearing by his attorney, C. W. Halverson of Halverson & Applegate, the co-partnership and joint adventurers consisting of Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, d/b/a Macri & Company, appearing by two of its partners and joint adventurers, Sam Macri and A. J. Goerig, and Sam Macri, Joe Macri and Don Macri, appearing by their attorneys, Thomas Holman and A. T. Bateman of Brethorst, Holman, Fowler & DeWar, attorneys for said Defendants Macri, and A. J. Goerig and Clyde Philp appearing by their attorneys, Kenneth Hawkins of the firm of Brown & Hawkins, and Continental Casualty Company, a corporation, appearing by its attorney Willard E. Skeel of Skeel, McKelvy, Henke, Evenson and Uhlmann, and the Hon. Sam M. Driver, Judge, having heard the evidence submitted, and having considered the stipulations and agreements entered into in open court, and being fully advised in the premises, makes the following

### Findings of Fact

1. That at all times herein mentioned, the plaintiff, J. W. Morrison, was and now is an individual d/b/a J. W. Morrison Company, and that he has filed his business certificate as by law required. That at all times herein mentioned, said J. W. Morrison was and now is a citizen and resident of Spokane, State of Washington.

## 2.

That at all times herein mentioned, the Defendants Sam Macri, Joe Macri and Don Macri, Clyde Philp and A. J. Goerig were co-partners and joint adventurers d/b/a Macri & Company. That said co-partners and joint adventurers will hereafter be referred to as Macri & Company. That at all times herein mentioned, said parties were and now are citizens and residents of Seattle, State of Washington.

## 3.

That at all times herein mentioned, the Defendant Continental Casualty Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Indiana, carrying on a general surety business and authorized as such to carry on such surety business in the State of Washington. That said Defendant Continental Casualty Company at all times herein mentioned was and now is a citizen and resident of the State of Indiana.

## 4.

That this action is brought in the name of the United States of America as Plaintiff for the use of J. W. Morrison, an individual d/b/a J. W. Morrison Company under and by virtue of the authority granted by an Act of Congress approved August 24, 1935 (Chap. 642, Sec. 1 and 2, 49 Statutes at Large, 793, 794).

## 5.

That on or about the 18th day of May, 1944, the United States of America through the Department of Interior and Macri & Company made and entered into a certain contract, being contract No. 12r-14996 for earthwork, pipelines, and structures, laterals 70.1 to 84.6 and Sublaterals, East Turbine lateral, station 260-99 in the end, and Sublaterals, East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington; Specifications #1068, wherein and whereby said Defendant contractors, Macri & Company contracted to furnish materials and perform work in accordance with said contract for the sum of \$169,667.50. That a copy of said contract has been admitted in evidence and by reference thereto the same is made a part hereof as though fully set forth herein.

## 6.

That on or about the 18th day of May, 1944, to secure faithful performance of said contract and the prompt payment to all persons supplying labor and materials employed or used in the prosecution and completion of the work provided for in said contract, said Defendant Macri & Company as principals and Continental Casualty Company, an Indiana corporation, as surety, made, executed and delivered to the United States of America as obligee a bond or undertaking as required by law in the sum of \$84,833.75; that said bond was conditioned

that if said Defendant Macri & Company should promptly make payment to all persons supplying labor and materials in the prosecution of the work provided for in the contract above described, said bond would be void, but otherwise to remain in full force and effect. That upon the award of said contract to the Defendant Macri & Company, said bond became binding and ever since has remained in full force and effect. That said bond or undertaking was and is by its terms binding upon said surety and upon said principals and each of them, their heirs, executors, successors and assigns and has been at all times since its issuance and now is in full force and effect, a copy of said bond having been admitted in evidence and by reference thereto is made a part hereof as though fully set forth herein.

## 7.

That the aforesaid contract No. 12r-14996 was and now is a contract for the prosecution and completion of a public work of the United States within the act of Congress referred to above, which said contract was performed and executed at Yakima County, in the Eastern District of the State of Washington.

## 8.

That heretofore and on or about the 21st day of April, 1944, the Defendant Macri & Company entered into a sub-contract in writing with J. W. Morrison, an individual d/b/a J. W. Morrison Company, wherein and whereby said Defendant Macri



& Company, sub-contracted to said J. W. Morrison Company, the following work at the agreed upon contract price, to-wit:

Item 1. Excavation, Common for Laterals, @.29c per cu. yd.

Item 2. Excavation rock for Laterals @\$1.00 per cu. yd.

Item 3. Overhaul at .03c per cu. yd.

Item 4. Compacting Embankments @.30c per cu. yd.

Item 14. Dry Rock Paving @\$2.35 per sq. yd.

9.

That pursuant to said sub-contract hereinabove referred to, said Sub-Contractor, J. W. Morrison, an individual d/b/a J. W. Morrison Company, between on or about May 18, 1944, and October 15, 1945, furnished labor and materials and performed services for said Defendant Macri & Company at their special instance and request of the reasonable and agreed value of \$7262.91 over and above all payments made by the Defendant to said Use-Plaintiff; that the parties to the above entitled action through their respective counsel of record have stipulated and agreed in open court that the Use-Plaintiff, J. W. Morrison, is entitled to a judgment in the amount of \$7262.91 with interest on said amount at 6% from date of judgment until paid, subject to the judgment's being appropriately fixed as to judgment debtors, all under Specifications #1068. That the Defendants Sam Macri, Joe Macri,

Don Macri, Clyde Philp, and A. J. Goerig, co-partners and joint adventurers entered into the subcontract above referred to with the Use-Plaintiff and said parties and each of them are indebted to the Use-Plaintiff in the sum of \$7262.91 with interest at 6% from date of judgment, which sum is due and unpaid. That all of the labor, materials and services so furnished and performed by the Use-Plaintiff for the Defendant Macri & Company were furnished and performed on Roza Division, Yakima project, Washington, Specifications No. 1068, within the Eastern District of Washington.

## 10.

That more than ninety days have elapsed since the last of said work, labor and materials so furnished and performed by said Use-Plaintiff J. W. Morrison Company as hereinabove set forth. That the complete performance and final settlement of said contract No. 12r-14996, between Macri & Company and the United States of America through the Department of Interior, was made on or about October 15, 1945, and less than one year has elapsed since said date and the filing of the complaint by the Use-Plaintiff and the commencement of this action in the above entitled court.

## 11.

That the ground upon which the jurisdiction of this court is invoked is that the action arises under the Act of Congress referred to above which ex-



pressly directs the bringing of such an action in this court, to-wit: The United States District Court, Eastern District of Washington, Southern Division, being the district in which said contract was to be and was performed and executed and the labor and materials furnished and performed by the Use-Plaintiff for the Defendant Macri & Company.

## 12.

That in connection with the issuance of defendant Continental Casualty Company's payment bond, above referred to, and as part of the consideration for the issuance thereof, defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers, to-wit: Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things said application for bond contains the following words and phrases, to-wit:

"Second. To indemnify the company against all loss, costs, damages, expenses and attorney's fees whatever, and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained."

From the foregoing Findings of Fact, the court makes the following

### Conclusions of Law

That judgment should be entered herein as follows:

1. That the Use-Plaintiff, J. W. Morrison d/b/a J. W. Morrison Company should have and recover judgment against the Defendants Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company, and against Continental Casualty Company, an Indiana corporation, and each of them, in the sum of \$7262.91, which said amount should bear interest at the rate of six per cent per annum from the date of judgment until paid, and for judgment for the Use-Plaintiff's costs and disbursements herein expended and to be taxed herein.

2. That the Defendant Continental Casualty Company, an Indiana corporation, should have and recover judgment against the Defendants, Sam Macri, Joe Macri, Don Macri, Clyde Philip, and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company and each of them in the amount of \$7,262.91 without interest thereon, together with a reasonable attorney's fee in the amount of \$225.00, together with their costs and disbursements herein incurred with interest thereon at the rate of 6 per cent per annum from the date of judgment until paid.

3. That the Cross-Complaint of the Defendants Sam Macri, Joe Macri, and Don Macri against the Defendants Clyde Philp and A. J. Goerig, be dismissed without costs.

4. That the Cross-Complaint of the Defendants A. J. Goerig and Clyde Philp against the Defendants Sam Macri, Joe Macri, and Don Macri be dismissed without costs.

Dated this 1st day of May, 1947.

/s/ SAM M. DRIVER,  
Judge.

Presented by:

WILLARD E. SKEEL,  
Of Skeel, McKelvy, Henke,  
Evenson & Uhlmann,  
Attorneys for Continental  
Casualty Company.

Filed May 1, 1947.

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Civil Action No. 251

THE UNITED STATES OF AMERICA for the  
use of J. M. MORRISON, an individual d/b/a  
J. W. Morrison Company,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, DON MACRI,  
CLYDE PHILP, A. J. GOERIG, SAM  
BURNSED, and JOHN DOE McCARTY,  
co-partners and joint adventurers d/b/a Macri  
& Company and CONTINENTAL CAS-  
UALTY COMPANY, an Indiana corporation,

Defendants.

### JUDGMENT

The above entitled case having come on duly and  
regularly for pre-trial hearing on January 7, 1947,  
and for trial on February 19, 1947, before the Hon.  
Sam M. Driver, District Judge of the above entitled  
court, the parties appearing in person and by their  
respective counsel of record herein, and the court  
having heretofore made it Findings of Fact and  
Conclusions of Law and being fully advised in the  
premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the Use-Plaintiff, J. W. Morrison, an individual d/b/a J. W. Morrison Company, have and recover judgment against the defendants Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company, and Continental Casualty Company, an Indiana Corporation, and each of them, in the sum of \$7262.91, together with interest thereon at the rate of six per cent per annum from the date hereof until paid, and for Use-Plaintiff's costs and disbursements herein expended and incurred in the amount of \$41.50, and

It Is Further Ordered, Adjudged and Decreed that the Continental Casualty Company, an Indiana corporation, have and recover judgments against the Defendants, Sam Macri, Joe Macri, Don Macri, Clyde Philp, and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company, and each of them in the amount of \$7,262.91 without interest thereon, together with an reasonable attorneys' fee in the amount of \$225 together with their costs and disbursements herein incurred in the amount of \$ none, but with interest thereon at the rate of 6% per annum from the date of judgment until paid,

It Is Further Ordered, Adjudged and Decreed that the cross-complaint of the Defendants Sam Macri, Joe Macri and Don Macri, against the defendants Clyde Philp and A. J. Goerig, be and the same is hereby dismissed without costs, and

It Is Further Ordered, Adjudged and Decreed that the cross-complaint of the Defendants A. J. Goerig and Clyde Philp against the Defendants Sam Macri, Joe Macri and Don Macri, be and the same is hereby dismissed without costs.

Dated this 1st day of May, 1947.

SAM M. DRIVER,

Judge.

Presented by:

WILLARD E. SKEEL,

Of Skeel, McKelvy, Henke,

Evenson & Uhlmann,

Attorneys for Continental  
Casualty Company.

Filed May 1, 1947.

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[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, A. J. Goerig and Clyde Philp and respectfully move the court for the entry of an order setting aside the judgment heretofore entered herein and entering judgment in the favor of these defendants or in the alternative granting these defendants a new trial upon the grounds and for the following reasons:

1. Irregularity in the proceedings of the court, jury and adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial;

2. Misconduct of the prevailing party, his attorney or the jury;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or decision;

7. Error in law occurring at the trial;

8. Where the right to procure a transcript of the testimony or proceedings has been lost without any fault or negligence on the part of the losing party.

The particular error relied upon by these defendants in moving for said new trial is the ruling of the court that the termination agreement did not absolve these defendants from all liabilities.

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendants

A. J. Goerig and

Clyde Philp.

Copy received this 12th day of May, 1947.

HALVERSON & APPLGATE.

Filed May 12, 1947.



[Title of District Court and Cause.]

## ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on for argument on the 20th day of May, 1947, before the Hon. Sam M. Driver, United States District Judge, upon the motion of defendants, A. J. Goerig and Clyde Philp for a new trial; and the Court having listened to argument and believing that the Court's original decision in this matter was correct that none of the grounds for defendants' motion for new trial exist or are well taken; and the Court being otherwise fully advised in the premises, it is

Now, Therefore,

Ordered, Adjudged and Decreed that the motion for new trial of defendants, A. J. Goerig and Clyde Philp, be and the same is hereby denied, to all of which said defendants, A. J. Goerig and Clyde Philp, except and their exception is allowed.

Done in Open Court this 27th day of May, 1947.

SAM M. DRIVER,  
Judge.

Presented by William E. Skeel.

Filed May 27, 1947.

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[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for



the Ninth Circuit from the final judgment entered in the above entitled action on the 1st day of May, 1947, and from order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 27th day of May, 1947.

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Appellants

A. J. Goering and

Clyde Philp.

Copies mailed to: Halverson & Applegate, Miller Bldg., Yakima, Wash.; Granville Eagan, 565 Empire Bldg., Seattle, Wash.; Skeel, McKelvy, Henke, Evenson & Uhlmann, Ins. Bldg., Seattle, Wash.; Brethorst, Holman, Fowler & Dewar, 17th Floor Hoge Bldg., Seattle, Wash., this 29th day of July, 1947.

A. A. LAFRAMBOISE,

Clerk,

By MARIE EALY,

Deputy.

Filed July 29, 1947.

[Title of District Court and Cause.]

APPELLANTS A. J. GOERIG'S AND CLYDE  
PHILP'S STATEMENT OF POINTS ON  
APPEAL

I. The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the use plaintiff. J. W. Morrison, for the following reasons:

1. There was no evidence introduced establishing the date of the delivery of labor and materials on specification 1068 by the use plaintiff or establishing the date the use plaintiff entered into the sub-contract for the furnishing of labor or materials, and the finding of the court with respect to such dates is not based upon any evidence of record.

2. Goerig and Philp were not liable for any obligations incurred by Macri & Company after the date of the termination agreement. There is no showing that the obligation on which the use plaintiff sued was incurred prior to the termination agreement.

3. The materials or labor furnished by the use plaintiff were furnished with respect to specification 1068. Goerig and Philp did not enter into any joint venture agreement with respect to 1068 and were not co-partners or co-adventurers of Macri & Company with respect to 1068 and were not therefore liable for any obligations of Macri & Company with respect to specification 1068.

II. The United States District Court was in error in entering Judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the reasons set forth above, and in addition thereto for the following reasons.

1. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself.

2. The Continental Casualty Company did not rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.

3. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philp were its silent "partners."

4. The "silent" partnership was terminated prior to affixing of liability on the bond.

5. Parties to a contract can modify or alter same—or rescind it—even though there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon.

6. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even though, for some other reason the surety is liable to the creditor.

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Appellants.

Filed July 30, 1947.

[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, Clyde Philp, and A. J. Goerig, the Defendants above named, as Principal, and the Manufacturers Casualty Insurance Company, a Corporation organized under the laws of the State of Pennsylvania, and legally doing business in the State of Washington, as Surety, are held and firmly bound unto J. W. Morrison, an Individual, d/b/a J. W. Morrison Company; Sam Macri, Joe Macri, Don Macri, Sam Bursed, John Doe McCarty, d/b/a Macri & Company, and Continental Casualty Company, an Indiana Corporation, in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1947.

The Condition of This Obligation Is Such, That

Whereas, the above named Plaintiff, J. W. Morrison, an Individual, d/b/a J. W. Morrison Company, on the 1st day of May, 1947, in the above entitled action and Court, recovered judgment against the Defendant, Sam Macri, et al., Goerig & Philp & Continental Casualty Company in the sum of \$7,262.91, and interest and costs, and the Conti-

mental Casualty Company recovered judgment over against A. J. Goerig and Clyde Philp in said amounts plus \$225 attys. fees.

And Whereas, The above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig & Clyde Philp, shall pay J. W. Morrison, d/b/a J. W. Morrison Company, Sam Macri, Joe Macri, Don Macri, Sam Burnsed, John Doe McCarty, d/b/a Macri & Co., all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

A. J. GOERIG,  
CLYDE PHILP,  
MANUFACTURERS  
CASUALTY INSURANCE  
COMPANY.

[Seal]      By A. A. NAEF,  
Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947.

[Title of District Court and Cause.]

United States of America,

Eastern District of Washington—ss.

### CLERK'S CERTIFICATE

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered 1 to 57, inclusive to be a full, true and correct copy of so much of the record, papers and proceedings, in the above entitled cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants A. J. Goerig and Clyde Philp, as the same now remains on file and of record in my office and that the same constitutes the record on appeal of said Appellant from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in this transcript of record on appeal is a copy of all exhibits designated by counsel for said Appellants.

I further certify that "the memorandum decisions of the Honorable Sam M. Driver dated Mar. 27, 1947" as called for in the supplemental designation of the Appellee Continental Casualty is not included in this record on appeal for the reason that no such document was signed or filed in this case.

I further certify that the fees of the Clerk of this Court for preparing and certifying the fore-

going typewritten record as called for in the designation of record on appeal of the Appellants amount to \$9.70, and the same has been paid in full by Brown & Hawkins, attorneys for said Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 28th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

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[Testimony of A. J. Goerig and Clyde Philp is set forth on pages 20 to 39. Stipulated portions of exhibits as called for in designation are set out on pages 58 to 114 of companion cause No. 11722.]

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[Endorsed]: No. 11723. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Goerig and Clyde Philp, Appellants, vs. Continental Casualty Company, a corporation, and J. W. Morrison, an individual, doing business as J. W. Morrison Company, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 2, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



[Adoption of Points on Appeal is set out on page 115 of companion cause No. 11722.]

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[Title of Circuit Court of Appeals and Cause.]

### STIPULATION

It is hereby stipulated by and between Counsel for the respective parties on appeal herein that the above entitled cause may be consolidated for the purpose of printing the record herein and for the purpose of printing the briefs herein and for the purpose of argument.

It is further agreed and stipulated that the Clerk in preparing the printed transcript of the record shall print one (1) only of the following matters previously designated in each of the above captioned cases in the designation and contents of record on appeal:

Testimony of A. J. Goerig.

Testimony of Clyde Philp.

Plaintiff's Exhibit "A"—contract and bond with respect to specification 1062.

Plaintiff's Exhibit "B"—contract and bond with respect to specification 1068.

Plaintiff Continental Casualty Company's Exhibit "1"—application for bond with respect to specification 1062.

Plaintiff Continental Casualty Company's Exhibit "2"—application for bond with respect to specification 1068.

Defendant Maeri's Exhibit "1"—Joint ven-



ture agreement with respect to specification 1062.

Defendants Macri's Exhibit "2"—joint venture agreement with respect to specification 1068.

Defendants Goerig and Philp's Exhibit "1"—termination agreement.

It is further stipulated that the Clerk in directing the printing of the transcript shall print all of the matters specified in each of the designations in all of the above captioned cases, but shall cause the same to be printed only once and shall eliminate any duplicate printing.

Dated this 17th day of September, 1947.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for Appellants  
Goerig and Philp.

SKEEL, McKELVY, HENKE,

EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,

Attorneys for Appellee  
Continental Casualty Company.

[Endorsed]: Filed Sept. 22, 1947.

